

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 FRIENDS OF LINN COUNTY,

5 *Petitioner,*

6
7 vs.

8
9 LINN COUNTY,

10 *Respondent,*

11 and

12
13 F.C. SCHWINDT,

14 *Intervenor-Respondent.*

15
16 LUBA No. 2002-176

17
18 FINAL OPINION

19 AND ORDER

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21
22 Appeal from Linn County.

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24 Ian Simpson, Portland, filed the petition for review and argued on behalf of
25 petitioner.

26
27 No appearance by Linn County.

28
29 Andrew J. Bean, Albany, filed the response brief and argued on behalf of intervenor-
30 respondent. With him on the brief was Weatherford, Thompson, Ashenfelter and Cowgill,
31 PC.

32
33 HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member,
34 participated in the decision.

35
36 REMANDED

04/07/2003

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38 You are entitled to judicial review of this Order. Judicial review is governed by the
39 provisions of ORS 197.850.

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NATURE OF THE DECISION

Petitioner appeals a county decision that adopts statewide planning goal exceptions and amends the comprehensive plan and zoning map designations for a 39.62-acre parcel.

MOTION TO INTERVENE

F.C. Schwindt (intervenor), the applicant below, moves to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is allowed.

FACTS

We remanded a prior county decision concerning this property in *Friends of Linn County v. Linn County*, 42 Or LUBA 235 (2002). The subject property includes almost 40 acres in four tax lots. The property is improved with a barn, two dwellings and several wells. As we explained in our prior opinion, the soils on the property are not well suited for farm or forest use, but “the subject property was used for grazing in the past and trees were harvested on a portion of the property approximately 40 years ago.” 42 Or LUBA at 237. Only five acres of the property currently receive property tax deferral based on forest use, but in the past approximately 27 acres received such property tax deferral.

The only road access to the subject property passes through Hidden Valley Estates Subdivision, a rural residential subdivision. The lots are generally 2.5 to 5 acres in size. The road passes through the subdivision and then climbs to the subject property, which is at a higher elevation than the subdivision. Adjoining properties to the north, west and south are zoned Farm/Forest and are somewhat separated from the subject property by steep slopes. The properties to the west and south are used for grazing the northern property is described as vacant.

We set out below relevant portions of our prior decision that explain why petitioner’s prior challenge to the county’s first irrevocably committed exception was sustained:

1 “* * * In the present case, although the county relies heavily on evidence that
2 tends to show the subject property may not be ‘agricultural lands’ or ‘forest
3 lands,’ as Goals 3 and 4 define those concepts, it did not find that the subject
4 property is not ‘agricultural land’ or ‘forest land,’ within the meaning of
5 Goals 3 and 4. Rather, the county adopted an irrevocably committed
6 exception * * * to those goals. * * *

7 “* * * * *

8 “The applicant grazed long-horn cattle on the subject property in the past.
9 However, the applicant presented evidence below that the land is not well
10 suited for grazing. In a letter, the applicant's attorney stated that the forage
11 produced on the property was of such poor quality, the applicant ‘was forced
12 to provide food [that was grown off-site] to the cattle almost year-round.’
13 Two other letters also take the position that the soils are not suitable for farm
14 use. One of those letters takes the position that cultivated agriculture would
15 be impossible on the shallow rocky soils. The other letter takes that position
16 as well, and also takes the position that the subject property is not suitable for
17 grazing. The county relied in large part on this evidence in concluding that
18 farm use of the subject property is impracticable.

19 “As previously noted, timber was harvested on the property a number of years
20 ago. Petitioner concedes that the soils on the subject property are not
21 particularly good forest land, but points out that the applicant's expert
22 estimated the site index at 95, which petitioner contends ‘is an index rating 15
23 points higher than the minimum (80) considered to be suitable for commercial
24 timber production as per the Soil Survey of Linn County[.]’ The trees that are
25 now on the property are few and of poor quality. The applicant's expert
26 testified that the subject property is not suitable for forest use. Apparently the
27 lack of water for irrigation, the elevation of the property, and its southerly
28 pitch all hamper use of the thin rocky soils for farm or forest use.

29 “Were it appropriate to focus exclusively or preponderantly on the
30 characteristics of the 39.62 acres that make up the approved exception area,
31 we might well deny the first assignment of error. However, while such a
32 focus is appropriate in determining whether the subject land is agricultural
33 land or forest land subject to Goals 3 and 4, it is not permissible in
34 determining whether the subject property is committed to uses that are not
35 allowed by those goals. In *Jackson County Citizens League v. Jackson*
36 *County*, 38 Or LUBA 489, 504-05 (2000), a case with many similarities to
37 this one, we explained that such a focus on the subject property in approving a
38 committed exception is not appropriate[.]”

39 “* * * * *

40 “In the present case, the county does identify certain conflicts that might
41 result from aerial application of herbicides, pesticides and fertilizer to more

1 intensively manage the property for forest use. The county identifies
2 additional conflicts that might result from a future need to move trucks and
3 heavy equipment onto the property in conjunction with farm or forest use,
4 necessitating travel through the adjoining rural residential subdivision to the
5 east.

6 “As petitioner correctly notes, these impacts are hypothetical. While we do
7 not agree with petitioner that the cited impacts could not support a committed
8 exception, simply because they are hypothetical, we agree with petitioner that
9 the challenged decision does not establish that the cited potential impacts are
10 more than the kind of occasional inconvenience that the Court of Appeals has
11 explained that rural residents must be willing to accept and live with[.]”

12 “* * * * *

13 “The challenged decision does not identify anything about the surrounding
14 area or the relationship of that area to the subject property that justifies a
15 committed exception. As a result, the first assignment of error is sustained.”
16 42 Or LUBA at 240-246 (footnotes and citations omitted).

17 **DECISION**

18 Petitioner’s assignment of error in this appeal is divided into a total of 15 subparts.
19 Addressing each of those subparts separately would significantly lengthen this opinion
20 without any real purpose being served. The fundamental flaw that we identified in our first
21 decision, which sustained petitioner’s equally multi-faceted challenge to the county’s first
22 attempt at adopting an irrevocably committed exception for the subject property, has not
23 been corrected in the county’s decision on remand.

24 ORS 197.732(1)(b) authorizes exceptions to Goals 3 and 4 to allow rural residential
25 use of rural farm or forest land if those farm or forest lands are irrevocably committed to
26 nonresource use.¹ In considering whether property is irrevocably committed to nonresource

¹ ORS 197.732(1)(b)’s authorization for irrevocably committed exceptions is nearly identical to the authorization for such exceptions in Goal 2, Part II(b). ORS 197.732(1)(b) provides:

“The land subject to the exception is irrevocably committed as described by Land Conservation and Development Commission rule to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable.

1 use, the county may consider limitations the property itself may pose for resource use of the
2 property. Those conditions on the property itself are a relevant consideration. However, the
3 county may not focus *exclusively* or even *preponderantly* on the characteristics of the
4 property that is to be included in the exception. We again note the caution that the Court of
5 Appeals included in its decision in *DLCD v. Curry County*, 151 Or App 7, 11-12, 947 P2d
6 1123 (1997):

7 “For a county to give exclusive or ‘preponderant’ weight to the characteristics
8 of the exception area alone, in performing its analysis, would be contrary to
9 the fundamental test for an irrevocable commitment exception, which requires
10 surrounding areas and their relationship to the exception area to be the basis
11 for determining whether the exception is allowable.”

12 Beyond the Court of Appeals’ admonition that the “preponderant” “weight” of
13 evidence supporting an exception must be related to the characteristics of that *surrounding*
14 *area* that make farm or forest use of property for which the exception is sought
15 “impracticable,” the high standard that is established by the ultimate “impracticability”
16 standard is also significant. *1000 Friends of Oregon v. LCDC*, 69 Or App at 731 (“an
17 exception must be just that – exceptional”).

18 Turning to the county’s decision and the record on remand, the only way a reasonable
19 decision maker might be able to conclude that farm or forest use of the subject property is
20 impracticable is if that decision maker gives preponderant weight to the poor quality of the
21 soils and other physical shortcoming of the subject property itself. As we pointed out in the
22 first appeal and again note here, the subject property is not particularly good agricultural or
23 forest land. The ratings for the soils on the property may be such that Goals 3 and 4 do not
24 even require that the county plan and zone that land for farm or forest use.² We note,
25 however, that although the applicant has identified a number of factors that make it

² Because the county has not considered that question, we do not consider it either.

1 reasonably clear that returning the property to farm or forest use will be difficult, the subject
2 property has been used for both purposes in the past.

3 The only significant difference in the first and second county decisions in this matter
4 is the discussions in the second decision about the possible need to bring in additional topsoil
5 to successfully reestablish trees on the property and the allegedly large amounts of water that
6 might be needed for certain farm or forest use of the property. The current decision
7 expresses concern about (1) the potential for that top soil to wash down on the lower-
8 elevation residential properties to the east; (2) the impact of additional truck traffic on that
9 residential neighborhood that might be required to bring in that top soil; and (3) the potential
10 effect on nearby residential wells from using large amounts of well water for farm or forest
11 use of the property.

12 The first and second of those concerns and other concerns the county identifies about
13 conflicts between possible farm and forest activities and the adjoining residential area to the
14 east are examples of the kinds of discomforts that are part and parcel of rural living in farm
15 and forest areas. At least the record in this case does not show that they rise to a more
16 serious level. In rejecting Jefferson County’s attempt to rely on such speculative conflicts to
17 justify irrevocably committed exceptions in *1000 Friends of Oregon v. LCDC*, the Court of
18 Appeals made the following observations:

19 “* * * A number [of the areas] have irrigated agriculture closely adjoining
20 existing rural residential development. The county treats this juxtaposition as
21 creating inevitable conflicts from spray drift, field burning smoke and plowing
22 dust, and it proposes to resolve the conflicts in favor of residential use. While
23 these conflicts may be a factor in showing that it is impracticable to continue
24 agricultural use of an area, they are not conclusive. People who build houses
25 in an agricultural area must expect some discomforts to accompany the
26 perceived advantages of a rural location. If problems of this sort by
27 themselves justified a finding of commitment, it would be impossible to
28 establish lasting boundaries between agricultural and residential areas
29 anywhere, yet establishing those boundaries is basic to the land use planning
30 process.” 69 Or App 727-728.

1 Given the conjectural and questionable nature and extent of the first and second concerns,
2 they lend almost no support to intervenor's argument that resource use of the subject
3 property is impracticable.

4 The third concern also adds little or nothing to intervenor's irrevocably committed
5 argument. If intervenor has a right to draw water from a well on the property to implement
6 farm or forest use of the property, his decision to do so may make it difficult for nearby rural
7 residences to continue to rely on ground water for domestic use. However, we do not see
8 that such a potential impact on the nearby rural residential uses could make farm or forest use
9 of the subject property impracticable.³

10 To summarize, the subject property is isolated topographically from its
11 Farm/Forest-zoned neighbors to the north, west and south. The subject property is also
12 somewhat isolated from its rural residential neighbors to the east. The subject property is at
13 the end of the road and at a higher elevation than its rural residential neighbors to the east.
14 The access to the subject property through the adjoining rural residential area to the east
15 presents the possibility of some conflicts with that rural residential area, as does drainage
16 from the subject property. However, the record simply does not show that these impacts
17 have much, if anything, to do with whether farm and forest use of the subject property is
18 impracticable. Given that the focus of an irrevocably committed exception must be
19 preponderantly on these adjacent properties, rather than any limitations inherent in the
20 subject property itself, the record in this matter simply does not include substantial evidence
21 that farm or forest use of the subject property is impracticable.

22 Petitioner's assignment of error is sustained.

23 The county's decision is remanded.

³ On the other hand if the property owner does not have a right to draw sufficient water from a well on the property to make farm or forest use of the property practicable, that *might* be a reason, in addition to the admittedly poor soils, why the property is improperly planned and zoned for farm or forest use under Goals 3 and 4 in the first place.